

**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SANTA ANA REGION**

October 25, 2002

ITEM: 16

SUBJECT: Consideration of a Settlement Agreement Related to Cleanup and Abatement Orders No. 88-10 and 88-69 and Los Angeles Land Company, et al. vs. Spic & Span, Inc. et al., Magnolia Plaza, Westminster, Orange County

INTRODUCTION:

The Regional Board issued Cleanup and Abatement Orders (CAOs) No. 88-10 and 88-69 to various responsible parties to investigate and remediate the subsurface contamination at the subject site. The remedial activities at the site were delayed due to unsettled legal issues among the responsible parties. The responsible parties have now established a settlement fund and drafted a Settlement Agreement to comply with the CAOs. The responsible parties are now requesting the Regional Board to enter into this Settlement Agreement with them to facilitate cleanup of the site using money from the settlement funds established for that purpose and to rescind the CAOs.

BACKGROUND:

The subject site, generally referred to as Magnolia Plaza, is located at 14072 Magnolia Avenue in the City of Westminster. This site is currently a strip mall housing a market, several restaurants and other retail establishments. Prior uses of the property included a retail store and a dry cleaning facility. A number of parties owned and/or operated businesses at the site. The dry cleaning facility operated at this site from April 1967 to May 1987. Perchloroethylene (PCE) is commonly used as a dry cleaning solvent. For the first two years of operation, the wastes from the dry cleaning operations were discharged into a subsurface septic tank system. In May 1969, the dry cleaning facility was connected to the local sewer system.

In 1987, while the property was being redeveloped as a strip mall, the buried septic tank system was uncovered and heavy subsurface contamination was discovered. The contaminated soil from a 40'W x 150'L x 9'D excavation was subsequently removed. During the excavation, groundwater was encountered at 9 feet below ground surface. A few monitoring wells were installed and sampling results indicated PCE concentrations of up to 72,000 parts per billion (ppb). The current State Maximum Contaminant Level (MCL) for PCE in drinking water is 6 ppb. Other volatile organic compounds (VOC) such as trichloroethylene (TCE), dichloroethylene (DCE) and the breakdown products of these chemicals (collectively referred to as VOC) were also found in the soil and groundwater at and around the site.

PRIOR REGULATORY ACTIONS

On March 11, 1988, the Board issued CAO No. 88-10 requiring the cleanup of VOC contaminated soil and groundwater at the site. The CAO named Arthur Spitzer, Harvey Jack Muller, and Bettina Brendel (all title owners of the property), Sol E. Tunks and Ed Tsuruta (formerly T & F, Inc.) (lease holders), New Fashion Cleaners, Inc., Spic and Span, Inc., and S & S Enterprises (operators of businesses at the site). The lease holders and the operators of businesses at the site were named as primary responsible parties for the cleanup and abatement of VOC contamination at, under and/or emanating from the site. The Board later amended this order by CAO No. 88-69, naming ARATEX Services, Inc. (ARATEX), as the company holding all the assets of New Fashion Cleaners, Inc., and naming ARATEX as a primary responsible party. Further revisions to the CAOs were made based on directives from the State Water Resources Control Board and/or the Los Angeles County Superior Court. These revisions included addition of other responsible parties and changing ARATEX's status to a secondary responsible party instead of a primary responsible party. Some of the entities named in the CAO are no longer in existence.

In 1988, the various parties filed a lawsuit in the United States District Court for the Central District of California. The unsettled legal issues and the inability of some of the parties named in the CAO to fund the remediation activities delayed investigation and remediation of the site. However, the various parties and Board staff continued to work on a cooperative effort to facilitate remediation of the site through a settlement agreement with respect to the pending lawsuit. A remediation plan and a contractor have been selected; a mechanism has been established for a settlement fund and for the various parties to enter into a Settlement Agreement. This is a unique situation where some of the responsible parties lack the resources to fund the remedial activities at the site and some of the other parties no longer exist. Insurance companies have provided most of the settlement fund. There were contributions from other responsible parties too. Board staff believes that under the circumstances, this is the most viable option to remediate the site. The proposed Settlement Agreement is practical and in the public interest given that it provides for funding for remediation as required under the CAOs.

Board staff participated in these negotiations and believes that under the proposed Settlement Agreement and using money from the settlement fund established for the site, the site can be remediated to acceptable levels.

The proposed Settlement Agreement is between the various parties named in the CAOs and the Regional Board. Once all the parties approve this agreement it must be submitted to the Superior Court for its approval and for dismissal of the court case. Under the proposed Settlement Agreement, the settlement fund will be liable for

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remediating the site and the parties named in the CAOs will be released from all liabilities to cleanup the site.

FUTURE ACTIVITIES

The settlement fund is known as the Magnolia Plaza Qualified Settlement Fund (Fund) and it currently has \$824,000.00 in it. Board staff was involved in the cost estimates for the cleanup and in the selection of the remediation technology and the contractor for the project. The Fund, and any interest earned on the Fund, shall be used to fund the remediation of the VOC contamination at, on, under, or emanating from the Magnolia Plaza property, subject to the terms and conditions of the Settlement Agreement.

The contractor will be authorized to proceed with remedial activities and will provide quarterly progress reports to Board staff. Upon completion of remedial activities, staff will consider closing the site by issuing a “no further action letter”.

A draft copy of the Settlement Agreement and General Release is attached to this report.

RECOMMENDATIONS:

Board staff recommends that the Board authorize the Executive Officer to: (1) Enter into the “Settlement Agreement and General Release” agreement; and (2) Rescind Cleanup and Abatement Orders No. 88-10 and 88-69 and amendments thereto.

SETTLEMENT AGREEMENT AND GENERAL RELEASE

A. PARTIES TO THIS SETTLEMENT AGREEMENT.

This Settlement Agreement and General Release (the "Agreement") is dated and made as of October 25, 2002, by and between the California Regional Water Quality Control Board, Santa Ana Region (the "Regional Board"), an agency of the State of California, on the one hand, and on the other hand, the following private parties:

1. Spic and Span, Inc. and S&S Enterprises, Inc. (collectively "Spic and Span");
2. Ann Violet Spitzer Trust No. 1 and Ann Violet Spitzer Lucas Trust No. 3, Harvey Jack Muller as Trustee of the Ann Violet Spitzer Trust No. 3, Arthur Spitzer, Eugene Nasch, and Bettina Brendel (collectively the "Spitzer Parties");
3. T&F, Inc., Ed Tsuruta, and Spl E. Tunks (collectively "T&F, Inc.");
4. Aramark, Inc. and Fashion Tex Services, Inc. (collectively "Aramark");
5. Shoji Yoshihara ("Yoshihara");
6. Grant Wada ("Wada");
7. Les Rodin, State Court Receiver Appointed by the Orange County Superior Court for Los Angeles Land Company and Shopwest Partners, Limited (collectively "Rodin"); and
8. Los Angeles Land Company and Shopwest Partners, Ltd., (collectively "L.A. Land").

The private parties referenced in items 1 - 8 above are hereinafter referred to collectively as the "Settling Parties."

B. RECITALS.

WHEREAS, the real property at issue in this Agreement consists of the property located at 14072 Magnolia Boulevard in Westminster, California (the "Property"), which is more particularly described on Exhibit "A," attached hereto. The Property is owned by California Trusts identified herein as the Spitzer Parties; and

WHEREAS, the Property has been used for commercial uses, including without limitation, the operation of several dry cleaning businesses; and

WHEREAS, the environmental investigations of the Property's soil and groundwater performed to date have revealed that the soil and/or groundwater which underlie the Property contain elevated levels of various compounds, including, without limitation, volatile organic compounds such as perchloroethylene, trichloroethylene, dichloroethylene and the breakdown products of these chemicals (the "PCE Contamination"); and

WHEREAS, in 1988, the Regional Board issued Cleanup and Abatement Order ("CAO") 88-10. CAO 88-10 named Spic and Span, Inc., S&S Enterprises, Inc., Fashion-Tex and T&F, Inc. as primarily responsible parties for the cleanup and abatement of the PCE Contamination at, under and/or emanating from the Property. The Regional Board later amended this order with CAO 88-69, naming Aramark as another primarily responsible party. Some of the parties appealed the Regional Board's decision, as modified by the State Board. During a subsequent mandamus action before the Los Angeles Superior Court, the State Water Board settled with Aramark by shifting its liability from primary to secondary status. The mandamus process also resulted in the dismissal of L.A. Land from liability under the Cleanup and Abatement Order. The current Cleanup and Abatement Orders are referred to herein as the "Orders;" and

WHEREAS, the Regional Board is a State Agency responsible for overseeing the investigation, testing, remediation, clean-up, monitoring and other response activity with respect to the environmental conditions at the Property; and

WHEREAS, the Regional Board and the remaining Settling Parties have been engaged in lengthy settlement discussions with respect to a lawsuit pending in the United States District Court for the Central District of California entitled Los Angeles Land Co., etc., et. al. v. Spic and Span, Inc., etc., et al., Case No. CV-88-0097 MRP; and

WHEREAS, the Settling Parties have all been working with the Regional Board to obtain approval of a remediation work plan and the establishment of a settlement fund to pay for the contract to remediate the Property; and

WHEREAS, the Settling Parties have reached a Settlement Agreement in the Federal Litigation with the participation and approval of the Regional Board and the United States District Court for the Central District of California, and that settlement is contingent upon a final settlement between the Settling Parties and the Regional Board; and

WHEREAS, the settlement between and among the Settling Parties, and this Agreement are both conditional on and subject to approval by the United States District Court; and the Superior Court of the State of California for the County of Orange; and

WHEREAS, the Regional Board worked with the Settling Parties to select the remediation contractor, and the Regional Board staff commented upon and required changes to drafts of the original work plan for the remediation of the Property; and

WHEREAS, the Regional Board has determined that this Agreement is practical and in the public interest and that it will fund the remediation of the Property as required by the Regional Board and will allow the Settling Parties to "buy their peace" and reach settlement of their Federal Litigation.

NOW, THEREFORE, the Regional Board and the Settling Parties agree as follows:

1. Parties Bound.

This Agreement shall apply to and be binding upon and shall inure to the benefit of the Regional Board and the Settling Parties, as well as their respective officers, directors, members, shareholders, partners, corporate parents and other related or affiliated companies or entities, employees, lenders and agents. The signatories hereto represent that they are fully authorized to enter into this Agreement and to legally bind the Regional Board and each Settling Party, respectively.

2. The Magnolia Plaza Settlement Fund.

2.1 Establishment of the Fund.

The Settling Parties shall contribute \$824,000.00 to a fund known as the Magnolia Plaza Qualified Settlement Fund (referred to herein as the "Magnolia Plaza Settlement Fund" or the "Fund"). The Fund, and interest drawn on the Fund, shall be used to fund the remediation of the PCE Contamination at, on, under, or emanating from the Property, subject to the terms and conditions of this Agreement.

2.2 Fund Administration.

2.2.1 The money in the Fund shall be used to pay for the remediation until such time as the Fund receives a no further action letter or until such time that all of the Fund resources are exhausted, whichever occurs first. In addition, money from the Fund shall be used to pay the reasonable fees of the Fund Administrator,

which fees shall not exceed \$15,000 per year. The Fund shall pay for the remediation, which shall be conducted in accordance with the HSI GeoTrans proposal attached hereto as Exhibit "B." Thirty (30) days prior to the initiation of the work described in the proposal attached hereto as Exhibit B, the Fund Administrator shall advance to HSI GeoTrans the sum of \$ _____, to pay for the first round of testing and the initial capital costs described in the proposal.

2.2.2 The regional Board shall allow the Fund to utilize the taxpayer identification number of the Regional Board or, if appropriate, the California Water Resources Control Board (the "State Board") taxpayer identification number, to minimize the tax impact upon the Fund. The use of a Regional Board or State Board taxpayer identification number shall not provide either the Regional Board or the State Board with any control over the Fund beyond the authority to approve payments out of the Fund to HSI GeoTrans.

2.2.3 To ensure compliance with the HSI GeoTrans proposal, the Board agrees to review and approve monthly payments to HSI GeoTrans to pay for work accomplished. HSI GeoTrans shall submit an update and progress report not to exceed one (1) page with each of its monthly invoices. If the Board has not served any written objection to a monthly invoice within ten (10) days of such an invoice being mailed to the Board, the invoice shall be deemed approved and the Fund Administrator shall be authorized to issue the requested payment. Unless otherwise instructed by the Board, HSI GeoTrans will meet with, or participate in conference calls with, staff of the Board no less than six (6) times per year, and shall submit detailed quarterly reports to the Board staff.

2.2.4 The Board shall have the discretion to request that the remediation plan for the Property be modified to address changed conditions or adopt technologies which the Board believes will more effectively address the conditions at the Property so long as such modifications do not (a) impede, impair or interfere with the development, construction, marketing, leasing, occupancy, operation or enjoyment of the Property by any holder of an interest in the Property or any visitor or patron, or (b) require expenditures in excess of the funds remaining in the Fund, making allowance for an appropriate reserve for administrative expenses and site closure, or (c) create liability or the risk of liability to any of the parties.

2.2.5 The Board in good faith shall consider issuing a "no further action letter" when and if appropriate. The decision to issue a "no further action letter" shall be in the Board's sole discretion, using its good faith judgment. The releases provided in this Agreement are not contingent or dependent upon the receipt of a no further action letter. In the event that the Fund obtains a no further action letter or other written proof from the Board of completion of the agreed and pre-approved remediation

process prior to the exhaustion of the Fund's resources, any money remaining in the Fund after payment of all remediation contractor invoices will be refunded to the Settling Parties in accordance with the QSF Fund Agreement [which is attached to this Agreement as Exhibit "C"].

2.3 Closure Requirements.

The Settling Parties shall require the Fund Administrator to notify the Regional Board if and when the Fund's assets have declined to a balance of \$100,000. The Settling Parties shall require the Fund Administrator to reserve \$82,500 to be used for proper closure of the remediation efforts at the Property.

3. Release.

In exchange for the establishment of the Magnolia Plaza Settlement Fund, the Regional Board agrees to forever relieve, release, remise and discharge every Settling Party, and each of them, as defined in Section A herein, and each of their respective past and present officers, directors, partners, shareholders, members, managers, trustees, beneficiaries, employees, agents, representatives, insurers, lenders, receivers, predecessors, successors, affiliates and attorneys from any and all claims (the term "Claims" means any and all claims, demands, duties, rights, actions, causes of action, debts, obligations, promises, damages, orders, accounts, payments, liens, costs, expenses, sums of money, suits, dues, guarantees, agreements, contracts, rights of contribution, indemnifications, liabilities, and/or demands, specifically including any public or private cause of action or action under state, federal or common law, including without limitation the California Porter-Cologne Act, CERCLA, 42 USC § 9601 *et. seq.*, or RCRA, 42 USC Section 6901, *et. seq.*, and any administrative orders, including Clean-up and Abatement Order 88-10, Clean-up and Abatement Order 88-69, and any versions of or modifications to those Orders) of whatever kind or nature, whether known or unknown, suspected or unsuspected, arising out of, relating to, and/or in any manner connected with the PCE Contamination or the Orders, and the facts or issues alleged or described in the Orders (the "Released Claims"). The Regional Board hereby covenants not to sue or take any other criminal, civil, judicial, or administrative or other action to pursue any matter arising out of the Released Claims or enter any order against any of the Settling Parties arising from or related to any and/or all pollutants or impacts existing at the Property (or which have migrated or could foreseeably migrate in the future within or from the Property) as of the effective date of this Agreement. This release and this covenant shall inure to the benefit of, and pass with each and every portion of the Property, and shall inure to the benefit of any and all successors and assigns of the Property.

4. Dismissal with Prejudice and Modification of Orders.

The Regional Board shall dismiss with prejudice each Settling Party from any liability or obligation under the Orders and specifically from Clean-up and Abatement Order 88-10 and Clean-up and Abatement Order 88-69 and any versions of or modifications to the Orders. In place of all of the named parties under any and all of the Orders, the Regional Board shall substitute in the Magnolia Plaza Settlement Fund as the sole and only responsible party under all Orders, and shall delete any of the remaining Settling Parties from the Orders. The Fund shall be the sole responsible party for the approved remediation under the Orders. The Regional Board will look to the Fund, and only to the Fund, with regard to the investigation and remediation of the PCE Contamination at the Property. The Board acknowledges that it will not hold the administrator of the Fund responsible for the approved remediation, for any investigation, or for any liability, whether under the Orders or otherwise.

5. Acceptance of Work Plan and Budget.

The Regional Board, through execution of this Agreement, accepts the Work Plan attached hereto as Exhibit "B" and accepts the budget of \$824,000.00 for investigation and remediation of the PCE Contamination at the Property. The Settlement Fund shall retain HSI GeoTrans, the pre-approved contractor, to execute a fixed cost not to exceed contract in the form attached hereto as Exhibit "D."

6. Access.

The current owner and the current operator of the Property hereby grant to the Regional Board, the remediation contractor, and their representatives, subcontractors and agents an irrevocable right of reasonable access to the Property for the purpose of implementing the characterization, investigation, monitoring and the approved remediation of the environmental conditions identified at the Property. The Regional Board and the approved remediation contractor shall not exercise the right of access provided for herein in such a way as to interfere unreasonably with the development, construction, marketing, leasing, occupancy or operation of the Property. The current owner and operator shall provide notice of this Agreement to any subsequent owner or operator to which the current owner or operator sells, leases or subleases the Property, and shall require that the subsequent owners or operators agree to comply with the terms of this Agreement. The Settling Parties shall record this Agreement with the County Recorder's office for the County of Orange, California.

7. Non-Interference.

Provided that the access limitations set forth in Section 6 above are satisfied and complied with by the approved remediation contractor and the Regional Board, the Property owner and operator agree not to unreasonably interfere with the approved contractor's compliance with the Remediation Plan or any additional requirements posed on the remediation contractor by the Regional Board.

8. Due Care.

Nothing in this Agreement shall be construed to relieve any present or future owner or operator of the Property of its duty to exercise due care toward preventing any future soil or ground water pollution at the Property (i.e., any new pollution or condition which does not comprise part of or arise from the present environmental condition) or of its duty to comply with applicable laws and regulations.

9. Miscellaneous.

9.1 The Regional Board agrees that the actions undertaken by the Settling Parties in accordance with this Agreement do not constitute an admission of any liability whatsoever by Settling Parties. Settling Parties hereby disclaim and deny any liability to any person or entity whatsoever.

9.2 The parties to this Agreement hereby agree that this writing embodies the entire Agreement between the parties with respect to the subject matter hereof, and that no representations, promises, or inducements of any kind have been made or relied upon by the parties to each other or to any officer, employee, agent or attorney of the parties, other than those which appear in writing in this Agreement, and that each covenant and condition mentioned in this Agreement is material consideration for the parties to enter into this Agreement. No claimed additions or modifications to or amendments of this Agreement, or any claimed waiver of any of its terms and conditions, shall be effective unless in writing and signed by all parties hereto.

9.3 This Agreement shall not be construed in favor of or against any party hereto, but rather shall be construed as if each of the parties hereto prepared this Agreement. The terms of this Agreement are contractual in nature and not a recital of facts. Further, this Agreement shall inure to the benefit of and bind the parties hereto and their respective Successors and Assigns. The term "Successors and Assigns" means (i) any person, corporation, partnership or other entity succeeding to any of the assets, liabilities, business or property interests of any Settling Party, or any Settling Party's parent, subsidiary or affiliated or related corporations (or of any other party entitled to the benefits of this Agreement pursuant to its terms) by virtue of merger, acquisition, asset

purchase, stock purchase, consolidation or otherwise; (ii) any person, corporation, partnership or other entity that acquires all or any portion of the Property, or that is assigned any Settling Party's right to acquire and does acquire the Property; (iii) the lenders of any Settling Party; (iv) the tenants or all or any portion of the Property; and (v) any party to whom buyer or any of the parties described in clause (i) or (ii) above may assign its rights under this Agreement. To benefit from the covenants and agreements of the Regional Board contained in this Agreement, however, a successor and assign must sign an agreement acknowledging that it will be bound by the terms of this Agreement.

9.4 The recitals set forth above and the exhibits attached hereto are incorporated herein by this reference as if set forth in full herein.

9.5 This Agreement is intended to confer rights and benefits only upon the parties to this Agreement and their respective past and present officers, directors, shareholders, members, representatives, employees, partners, managers, trustees, beneficiaries, agents, insurers, lenders, receivers, predecessors, successors, affiliates and attorneys. This Agreement is also intended to confer benefits upon Successors and Assigns of the parties to this Agreement who sign an acknowledgment that they will be bound under Section 8.3 hereof and their respective officers, directors, members, representatives, partners, employees, and agents. No person or entity other than such parties shall have any legally enforceable rights under this Agreement.

9.6 This Agreement shall be controlled by and construed and interpreted in accordance with the laws of the State of California.

9.7 Whenever the context hereof requires, the use of the singular number shall include the appropriate plural number.

9.8 This Agreement may be executed in counterparts, each of which shall constitute an original, but all of which together shall constitute a single Agreement.

9.9 If any term, provision, covenant or condition of this Agreement is held by a court of competent jurisdiction to be invalid, void or unenforceable, the remainder of the provisions of this Agreement shall remain in full force and effect and shall in no way be affected, impaired or invalidated provided the intent of the parties is upheld and preserved by such interpretation. If the parties' intent is not upheld and preserved by severing any such void, invalid or unenforceable provision, then that provision shall not be severed and this Agreement shall become null and void in its entirety.

9.10 The effectiveness of this Agreement is conditional on and subject to approval by the United States District Court for the Central District of California and the Superior Court of the State of California for the County of Orange. The parties to this Agreement agree to submit to the jurisdiction of the United States District Court for the Central District of California with regard to any disputes relating to this Agreement, its interpretation, enforcement or implementation.

IN WITNESS WHEREOF, the Regional Board and each Settling Party have caused this Agreement to be executed on the date first written above.

California Regional Water Quality Control Board,
Santa Ana Region

By _____
Name _____
Its _____
Authorized Signatory _____

Date: _____, 2002

SPIC AND SPAN, INC.

By _____

[Printed Name and Title]

Date: _____, 2002

S&S ENTERPRISES, INC.

By _____

[Printed Name and Title]

Date: _____, 2002

ANN VIOLET SPITZER LUCAS TRUST NO. 1

By _____

[Printed Name and Title]

Date: _____, 2002

ANN VIOLET SPITZER LUCAS TRUST NO. 3

By _____

[Printed Name and Title]

Date: _____, 2002

HARVEY JACK MULLER

By _____

Harvey Jack Muller as Trustee of
the Ann Violet Spitzer Lucas Trust No. 3

Date: _____, 2002

ARTHUR SPITZER

By _____

Arthur Spitzer

Date: _____, 2002

EUGENE NASCH

By _____

Eugene Nasch

Date: _____, 2002

BETTINA BRENDEL

By _____

Bettina Brendel

Date: _____, 2002

T&F, INC.

By _____

[Printed Name and Title]

Date: _____, 2002

ED TSURUTA

By

Ed Tsuruta

Date: _____, 2002

SOL E. TUNKS

By

Sol E. Tunks

Date: _____, 2002

ARAMARK, INC.

By

[Printed Name and Title]

Date: _____, 2002

FASHION-TEX SERVICES, INC.

By

[Printed Name and Title]

Date: _____, 2002

SHOJI YOSHIHARA

By

Shoji Yoshihara

Date: _____, 2002

GRANT WADA

By

Grant Wada

Date: _____, 2002

LES RODIN,
STATE COURT RECEIVER FOR SHOPWEST
PARTNERS, LIMITED

By _____

[Printed Name and Title]